SUBJECT INDEX

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES AND REGULATIONS INVOLVED	3
STATEMENT	3
SPECIFICATIONS OF ERROR TO BE URGED	6
REASONS FOR GRANTING THE WRIT	6
CONCLUSION	21
APPENDIX	23

LIST OF AUTHORITIES

CASES	PAGE
Brooklyn Savings Bank v. O'Neil, 65 S. Ct. 895, 324 U.S. 697	19
Commissioners of the State Ins. Fund v. United States, 72 F. Supp. 549 (D.C., N.Y., 1947)	20
Galveston H. & S. A. Ry. Co. v. Pigott, 116 S.W. 831 (Tex. Civ. App., 1909)	18
Galveston Ry. Co. v. Bean, 99 S.W. 721	18
Galveston Ry. Co. v. Mullen, 198 S.W. 409	18
Garrard, et al., v. Henderson, et al., 209 S.W. 2d 225 (Tex. Civ. App., 1915)	17
Gerald v. Standard Oil Co., 10 So. 2d 409	14
Honea v. Coca Cola Bottling Co., 183 S.W. 2d 968	14
Horton Motor Lines v. Currie, 92 F. 2d 164 (C.A. 4)	14
Korte v. New York, N. H. & H. Ry. Co., 191 F. 2d 86 (C.A. 2, 1951, cert. den.)	10
Levy v. Indemnity Ins. Co., 8 So. 2d 774	14
Mammoth Oil Co. v. United States, 275 U.S. 13, 48 S. Ct. 1	16
Marich v. United States, 84 F. Supp. 829 (D.C. Cal., 1949)	20
Maxwell v. United States, 141 F. 2d 139 (C.A. 7, 1944)	20
M. K. & T. Ry. Co. v. Flood, 70 S.W. 331, 79 S.W. 1106	18
Moran v. Pittsburgh-Des Moines Steel Co., 183 F. 2d 467	7
Oceanic Steam Nav. Co. v. Aitken, 25 S. Ct. 317, 196 U.S. 589	12
Pacific Ex. Co., et al., v. Watson, 124 S.W. 127 (Tex. Civ. App., 1909)	19
Palmer v. Hoffman, 318 U.S. 109, 63 S. Ct. 477	9

Pekelis v. Trans-Continental & Western Air, Inc., 187 F. 2d 122 (C.A. 2, 1951, Cert. Den.) 8
Peters, et al., v. Clements, 52 Tex. 140 (S. Ct., 1879) 18
Plunkett v. Union Electric Service, 36 So. 2d 704 14
Sands v. Curfman, 177 S.W. 161 (Tex. Civ. App., 1915) 17
Simpkins, et al., v. Searcy, et al., 32 S.W. 849 (Tex. Civ. App., 1895) 18
Stone v. Stone, 136 F. 2d 761 16
Texarkana National Bank v. Hubbard, 114 S.W. 2d 389 (Tex. Civ. App., 1938) 18
Texas & P. Ry. Co. v. Jones, 133 S.W. 744 (Tex. Civ. App., 1911) 18
Thompson v. Brown, 222 S.W. 2d 442 14
Uarte v. United States, 7 F.R.D. 705 20
United States v. Kesinger, et al., 190 F. 2d 529 (C.A. 10) 14
Watson, et al., v. Glenn, 82 S.W. 2d 704 (Tex. Civ. App., 1935) 17

UNITED STATES STATUTES

Federal Business Records Statute, 62 Stat. 945, 28 U.S.C., Sec. 1732 ..... 2, 3, 7, 9, 23
28 U.S.C., Section 1254(1) 2
1948 Revised Judicial Code, 28 U.S.C., Secs. 1346(b), 2671-2680 3

MISCELLANEOUS

Air Force Regulation 62-14 ..... 3, 23

TEXT

65 C. J. S. 17(a) 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No._____

W. K. CHAPMAN, ET UX., *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

W. K. CHAPMAN, ET UX., your Petitioners, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on March 8, 1952.

Opinions Below

The opinion of the United States District Court for the Southern District of Texas was in memorandum form and not reported (R. 283). The opinion of the Court of Ap-

peals for the Fifth Circuit (R. 300) affirming the judgment of the District Court is reported at 194 F. 2d 974.

Jurisdiction

The judgment of the Court of Appeals for the Fifth Circuit is dated March 8, 1952 (R.——). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

Questions Presented

1. Whether the Army Air Forces' Accident Investigation Report concerning the cause of the airplane accident prepared by employees of the United States is admissible in evidence as either an admission against the interest of the United States or as a record made in the regular course of business under the Federal Business Records Statute, 62 STAT. 945, 28 U.S.C., Sec. 1732.

2. Whether the exclusion from evidence of the Army Air Forces' Accident Investigation Report, which found the cause of the accident to be the result of the pilot's "poor judgment" in various aspects, was *harmless error* although not discredited in any way, and which report supported all elements of Petitioner's case.

3. Whether the rule of res ipsa loquitur, pleaded in the alternative by Petitioners, is applicable under the Tort Claims Act to an airplane accident, where the undisputed facts disclosed (a) the airplane to be in the exclusive custody and control of the servants and employees of the United States acting within the scope of their employment for the benefit of the United States, and (b) a flight of the airplane undertaken resulting in a crash killing all on board, the exact cause of the accident being unknown to Petitioners but within the knowledge of the servants and employees of the United States.

4. Whether Petitioners satisfied their burden of proof of negligence and thus whether the action of the United States District Court in failing to find negligence was clearly erroneous and unjustified where the undisputed facts disclosed (a) the failure of the pilot to land the airplane at the nearest available airport after experiencing engine and equipment failure, and thereafter, (b) the failure of the pilot to land the airplane on the nearest available runway (the runway in use) at the New Orleans Municipal Airport, and (c) the attempted maneuvering of the malfunctioning airplane by the pilot while over the New Orleans Municipal Airport resulting in the subsequent spin and crash of the airplane.

5. Whether a release instrument relieving the United States of all liability for negligence and allegedly executed by the deceased minor, and one of the Petitioners herein, is unenforceable.

Statutes and Regulations Involved

The pertinent provisions of the Federal Business Records Statute, 62 STAT. 945, 28 U.S.C., Sec. 1732, and Air Force Regulation 62-14 are set forth in the Appendix at pp. 23-27.

Statement

Petitioners (Plaintiffs below) brought this action against the United States of America in the United States District Court for the Southern District of Texas under the Tort Claims Act, as amended,[1] in which Petitioners sought damages for the death of their minor son, Walter Kyle Chapman, Jr., resulting from the crash of an airplane of the United States Army Air Forces. The deceased, Walter Kyle Chapman, Jr., a civilian, was aboard the airplane as a pri-

[1]1948 Revised Judicial Code, 28 U.S.C., Secs. 1346 (b), 2671-2680.

vate in the Civil Air Patrol. The answer (R. 27, 44) pleaded unavoidable accident and the defense of a release allegedly executed both by the minor and his father, one of the Petitioners here, prior to the flight.

The basic facts are undisputed. The airplane involved was an Air Force T-7 type, being a two-engine Beechcraft. Four passengers (including Chapman) in addition to the pilot and co-pilot were aboard the airplane when it departed Ellington Air Force Base near Houston, Texas, for the New Orleans Municipal Airport at approximately 12:30 P.M., on September 12, 1948. At 2:37 P.M. the pilot contacted the New Orleans Station by radio and reported that he was fifteen miles South of Baton Rouge at 2000 feet elevation and was encountering bad weather and overcast. At 3:11 P.M. the pilot again radioed that he was approximately ten miles out of New Orleans but unable to determine his position, stating that his radio receiver was not operating. At 3:24 P.M. he radioed that he was at an elevation of 750 feet, that one engine was not operating and that he was in a state of emergency and would land at the first field available. Upon receipt of this message, the New Orleans Station alerted all other fields in the vicinity. At 3:32 P.M. the pilot reported that he was coming down the edge of Lake Pontchartrain with one engine out and the remaining engine running rough. A notation attached to this message noted that the first field would probably be the Naval Auxiliary Field (R. 285). The airplane was observed about one mile to the West of the Naval Field at an approximate altitude of 200 feet (R. 50). The Control Tower at the Naval Field immediately gave the airplane a green light, indicating that it should land (R. 51). The pilot of the airplane failed to respond to the green light and passed the Naval Field at a distance of approximately one-half mile (R. 52).

After passing the Naval Field, the airplane approached the New Orleans Municipal Airport which was several miles distant. The airplane was then directly lined up with Runway 9 of the New Orleans Municipal Airport, which was the Runway in use at the time. Control Tower personnel of the New Orleans Municipal Airport promptly gave the pilot a green light, signaling him to land immediately. There was no response by the pilot. Instead, the pilot made a turn to the right at an altitude of approximately 200 feet proceeding to make a traffic pattern to attempt to land on Runway 36. The Tower personnel at the airport again flashed a green light which was finally acknowledged by the blinking of the airplane's landing lights. The pilot then attempted to executed a left turn to align the airplane with Runway 36, and at the same time endeavored to lower the landing gear (R. 250, 286). At this point, the airplane lost flying speed went into a tail spin, crashed and burned (R. 286). All aboard the airplane, including Walter Kyle Chapman, Jr., were killed and the airplane was completely destroyed by fire (R. 283, 286).

During the course of the trial, Petitioners (Plaintiffs below) offered in evidence (R. 250) the Army Air Forces' Accident Investigation Report which was excluded by the Trial Court upon the objection of the Government that the Report consisted only of opinions and conclusions based upon hearsay (R. 251, 290). The Government however offered in evidence certain selected documents from the Report which were received by the Court over Petitioner's objection and insistence to admit the *entire* report (R. 97, 124-126, 171-173, 254). The District Court held that Petitioners failed to prove negligence and were further precluded from any recovery by the alleged release (R. 290). Upon appeal to the Court of Appeals for the Fifth Circuit, the judgment was affirmed (R. 309), the Court holding

that the Accident Report was inadmissible and that Petitioners had failed to discharge their burden of proof of negligence.

At the time of his death young Chapman was a private in the Civil Air Patrol, with orders to proceed on a navigational training flight from Ellington Air Base to New Orleans, and return (R. 68, 283). The Civil Air Patrol is a civilian volunteer organization and auxiliary of the United States Air Forces established as such by Act of Congress.[2]

Specifications of Error to be Urged

The Circuit Court in affirming the judgment of the District Court erred:

1. In holding that the Accident Report was not admissible in evidence as either admissions against interest or regular business entries within the terms of the FEDERAL BUSINESS RECORDS STATUTE, 28 U.S.C., Sec. 1732.

2. In holding that the exclusion of the Accident Report was "harmless error."

3. In holding that the doctrine of "Acts in emergency or Sudden Peril" is applicable to this type of airplane accident case.

4. In failing to apply the doctrine of res ipsa loquitur.

5. In holding that Petitioners (Plaintiffs below) did not satisfy their burden of proof of negligence.

6. In failing to find that the alleged release instrument was unenforceable.

Reasons For Granting The Writ

The decision below should be reviewed because it erroneously interprets the Tort Claims Act so as to thwart the

[2] 5 U.S.C., Sec. 626 (1); 36 U.S.C., Secs. 201-208.

legislative policy which it was designed to effectuate. The decision below is in conflict with those of other Federal Courts and it concerns matters of public policy and issues of far reaching importance which this Court should decide.

1. In holding that the Army Air Forces Board's Report of Aircraft Accident was not admissible in evidence, the United States District Court and Court of Appeals below have decided a question of Federal law which is in direct conflict with decisions of other Circuit Courts on the same matter. The Accident Report is an official report of the Army Air Forces Aircraft Accident Investigation Board regarding the accident here in question, comprised of a number of statements, reports, diagrams and other documents bound together under one seal. It sets forth the causes of the accident and the Board's opinion that the pilot exercised poor judgment and technique in numerous aspects (R. 289), thus supporting all important elements of Petitioners' case. The entire document is under the seal of the Department of the Air Forces and is set forth on War Department AAF Form 14 termed "Army Air Forces Report of Major Accident" together with attachments, all being made pursuant to Air Force Regulation 62-14 (set out in the Appendix). The decision of the Court of Appeals below in excluding the report is based upon an interpretation of the Federal Business Records Statute. 62 STAT. 945, 28 U.S.C., Sec. 1732 (set out in the Appendix, infra).

The holding by the Court below is squarely opposed to that rendered by the Third Circuit Court in the case of MORAN V. PITTSBURGH-DES MOINES STEEL COMPANY, 183 F. 2d 467, wherein an action was instituted for accidental death caused by the explosion of a gas storage tank designed and constructed by Defendants therein. There was offered in evidence a report by the United States Bureau of Mines which had been signed by five Bureau experts who made

their own investigation and who had concluded that the tank disintegrated rather than exploded. The conclusions of the Board supported important elements of the Plaintiff's case. The Third Circuit Court held that the report of the explosion was a record of occurrence or event and was part of the "business" of the Bureau thus making the report admissible under the Federal Statute relating to admissibility of records made in the regular course of business. That Court stated as follows:

> "The report is no less admissible because it contains conclusions of experts which are based upon hearsay evidence as well as upon observation. These circumstances, by virtue of express statutory provision, go to weight rather than to admissibility. Moreover, this Court has several times held that hospital records are admissible under the statute, and certainly medical diagnosis is no less a matter of opinion based upon observation and perhaps hearsay than this report of the Bureau's investigation. Bartkoski v. Pittsburgh & Lake Erie R. Co., 3 Cir., 1949, 172 F. 2d 1007; Norwood v. Great American Indemnity Co., 3 Cir., 1944, 146 F. 2d 797; Pollack v. Metropolitan Life Insurance Co., 3 Cir., 1943, 138 F. 2d 123."

This precise point was recently considered in the case of PEKELIS v. TRANS-CONTINENTAL & WESTERN AIR, INC., 187 F. 2d, 122 (C.A. 2, 1951, Cert. Den.) wherein the Circuit Court came to a conclusion diametrically opposed to that reached by the Fifth Circuit Court below. The suit was by a wife against the airline to recover damages for the accidental death of her husband killed in a crash while a passenger aboard Defendant's airplane. Reports of the accident were made by various agencies, including the Regional Accident Investigating Board, the Civil Aeronautics Authority, the Civil Aeronautics Board and the

TWA Regional Board. In its opinion, the Second Circuit Court held that all of the accident reports offered by Plaintiff should have been admitted either as admissions of the Defendant corporation or under the Federal Business Records Statute, 28 U.S.C., Sec. 1732 (set out in the Appendix, infra). In regard to the reports of the accident, the Circuit Court stated as follows:

> "* * * We think that the reports were all admissible *in toto*. Indeed, it would seem to be impossible to disentangle the conclusions from the facts on which they were based. Moreover, out of fairness to both parties the jury should have been able to consider all of the reports as a whole. The fact that they were based on hearsay and expressed opinions would go to their credibility rather than to their admissibility."

The Second Circuit Court's interpretation of this Court's opinion in PALMER v. HOFFMAN, 318 U.S. 109, 63 S. Ct. 477, is directly opposed to that placed upon it by the Court of Appeals below. The Second Circuit Court stated (and we submit, correctly) as follows:

> "It was this consideration, we believe, that led the Supreme Court to say that the reports in *Palmer v. Hoffman*, supra, were not business entries within the meaning of the statute for the reason that 'Their primary utility is in litigating, not in railroading.'
>
> "The reports in the case at bar were against the interest of the entrant when made, since they charged serious fault on the part of employees Best and Langsdale, and whether or not completely accurate were clearly not part of a story cooked up in advance of litigation in the disguise of business records. Moreover, it is not the entrant who here sought to introduce the reports, but the plaintiff, and this too tends to show that they were not contrived by the entrant for litigation.

> *Palmer v. Hoffman* was given the above interpretation by this court in *United States v. Moran*, 151 F. 2d 661, 662, and *Lopoczyk v. Chester A. Poling, Inc.*, 152 F. 2d 457, 460, note 4. We hold that Palmer v. Hoffman, did not preclude the reception under the business entry statute of the reports offered in the case at bar."

Still another conflicting Circuit Court opinion is that of KORTE v. NEW YORK, N. H. & H. RY. CO., 191 F. 2d 86 (C.A. 2, 1951, cert. den.), wherein the Court held that doctors' reports in the form of letters were admissible. The Court of Appeals below cites only the dissenting opinion in this case in order to justify its holding (R. 309).

2. Moreover, the Court below in finding that the exclusion of the accident report, if error, was harmless error (R. 308) has committed prejudicial error which contributes to the injury of the substantial rights of Petitioners. The accident report, if admitted, carefully examined and viewed in its most favorable light would have justified and required a different conclusion on the matter of negligence.

Although apparently given scant attention by either Court below, the accident report was before both the United States District Court and the Court of Appeals (R. 308) due to the fact that when Respondent introduced in evidence selected pages of the report, it could not separate them from the remainder thereof, same being under one document and seal (R. 172-173). Yet, the accident report not only verfied certain factual data already in evidence, it further set forth the opinions and conclusions of the Board to the effect that the primary cause of the accident was adjudged to be the exercising of poor judgment on the part of the pilot (R. 289) in (a) failing to land at the first airport available to him (Naval Air Field), in (b) failing to land on the runway with which he was directly aligned when approaching the New Orleans Municipal Airport, in (c) electing to fly

a regular flight pattern around the airport on only one engine, heavily loaded and in (d) failing to maintain sufficient air speed for a safe landing. The report further stated that *pilot technique* was the secod main cause of the accident in that traffic pattern was flown at a very low air speed and nose high attitude, a stalling turn was made into a dead engine upon a final approach, with no attempt made to lower the nose of the airplane in order to offset the stalling effects of lowing the gear prior to landing.

Despite the availability of the foregoing evidence, the Court of Appeals below made the following statement (R. 302):

> "We think it clear, indeed it is hardly contended otherwise, that there is ample evidence from which a reasonably adequate picture of the flight from its very beginning until shortly before its sudden and fatal ending may be drawn, and that in that picture no proof of negligence appears. The last critical moments of the flight, as time and tide go in a plane which, though still airborne, is in desperate plight, must, however, remain forever shrouded behind the impenetrable curtain which death has drawn. This curtain neither investigators, nor boards, nor even judges can pierce, except by speculation and conjecture, and these may not take the place of proof. Since knowledge must precede understanding, and understanding must precede judging, and we cannot know, we cannot judge what was done by the pilot that he ought not to have done, what was left undone by him that he ought to have done, it is, *we think, fatal to plaintiffs' claim that they were unable to discharge their burden of proof by presenting evidence as to what in those critical moments was happening to and within the plane.*"

The Court of Appeals below has then stated that while there was ample evidence giving an adequate picture of the

flight, the actual cause of the accident must remain undetermined because of the curtain of death. *Under such a construction of the law, the Court of Appeals has forever precluded any finding of negligence in an airplane accident case where all persons on board are killed.*

It is common knowledge that a military pilot is trained to cope with emergencies as may arise while flying an airplane and which may be reasonably anticipated. It becomes incumbent upon him to exercise his judgment while engaged in the mechanics of a flight, and in this sense a pilot may be considered an expert. But to say one so engaged cannot be negligent while exercising "poor judgment" is conflicting with a decision of this Court, speaking through Mr. Justice Holmes, in the case of OCEANIC STEAM NAV. CO. v. AITKEN, 25 S. Ct. 317, 196 U.S. 589, as follows:

> "It is quite true that negligence must be determined upon the facts as they appeared at the time * * * but it is a mistake to say, as the petitioner does, that if the man on the spot, even an expert, does what his judgment approves, he cannot be found negligent. The standard of conduct, whether left to the jury or laid down by the court, is an external standard, and takes no account of the personal equation of the man concerned. The notion that it 'should be co-extensive with the judgment of each individual' was exploded, if it needed exploding, by Chief Justice Tindal, in Vaughan v. Menlove * * * "

The Court of Appeals below further applied the doctrine of "Acts in Emergency or Sudden Peril" to the facts of the instant case (R. 307). This doctrine is founded upon the theory that a person who omits to act in the most judicious manner because of want of time in which to form a judgment is not chargeable with negligence. The doctrine is usually applied to automobile cases. The Court below has

thus decided an important question of Federal law within the Tort Claims Act, which has not been but should be settled by this Court, under which the doctrine of "Acts in Emergency" may be uniformly applied to all cases of airplane accidents, thereby precluding any possible finding of negligence. The very act of flying an airplane demonstrates otherwise.

It is a matter of common knowledge that most anything out of the ordinary that happens to an airplane in flight is to some degree an emergency. Often a pilot is required to act quickly in cases of engine or radio trouble, which might reasonably be anticipated, and he should act with the care of a man trained to meet just such situations. These principals, supported by full authority, are clearly set forth in 65 C. J. S., 17 (a) Negligence, as follows:

> "* * * A mere necessity for quick action does not constitute an emergency within the rule where the situation or the danger calling for such action is one which should reasonably have been anticipated and which the person charged with negligence should have been prepared to meet."
>
> "* * * and if one's conduct did not measure up to the standard of ordinary care under the circumstances in which he found himself he is chargeable with negligence notwithstanding the existence of the emergency. In this connection his conduct is not necessarily to be judged according to the circumstances as they appeared to him, and the proper test is how the circumstances ought to have appeared to him in the exercise of reasonable care."

The pilot in the instant case had ample time in which to determine the best course to pursue. Having already encountered trouble, at 3:24 P. M. he reported that he was operating on only one engine, was in a state of emergency,

and would land at the first field he came to (R. 285). From then on every second counted. But the accident did not occur until some twenty (20) minutes thereafter at 3:43 P. M. The pilot thus had sufficient opportunity for full exercise of judgment, and was not in the position of one who is suddenly confronted with a totally unforeseen peril which left no time for deliberation. HORTON MOTOR LINES v. CURRIE, 92 F. 2d 164 (C.A. 4).

3. By failing to apply the rule of res ipsa loquitur to this case of aircraft accident, when all requirements of the rule were fully satisfied, the United States District Court below decided a question of law in direct conflict with the decisions of other Circuit Court of Appeal on the same matter, and has decided a question of Federal law under the Tort Claims Act which has not been but should be settled by this Court.

Petitioners plead the doctrine of res ipsa loquitur in the alternative (R. 11). In both the States of Texas and Louisiana, it is held to be a rule of evidence and is not precluded by the further pleading of specific act of negligence,[3] nor are Petitioners precluded from the benefit of evidence favorable to them introduced by the Government (UNITED STATES v. KESINGER, infra).

In not applying the doctrine of res ipsa loquitur, the District Court below reached a decision sharply inconsistent with that of UNITED STATES v. KESINGER, ET AL., 190 F. 2d 529 (C.A. 10) which involved the crash of an Army Air Forces' airplane. An action was brought against the United States under the Tort Claims Act. Similar to the facts of the instant case, the Court found the Army airplane to be in the exclusive custody and control of the servants and

[3] Texas: **Honea v. Coca Cola Bottling Co.**, 183 S.W. 2d 968; **Thompson v. Brown**, 222 S.W. 2d 442; Louisiana: **Gerald v. Standard Oil Co.**, 10 So. 2d 409; **Levy v. Indemnity Ins. Co.**, 8 So. 2d 774; **Plunkett v. Union Electrical Service**, 36 So. 2 704.

employees of the United States acting within the scope of their employment; that a flight of the airplane was undertaken resulting in a crash and consequent destruction of farm buildings; that the employees of the United States had the best opportunity of ascertaining the cause of the accident and that Plaintiffs therein did not know and could not readily ascertain and establish same by proof. The Tenth Circuit Court after a thorough review of all pertinent cases on the matter (which are cited in the footnotes of the opinion) held the rule of res ipsa loquitor applicable stating as follows:

> "The modern trend of authority is to hold the rule of res ipsa loquitur applicable to airplane accidents, and we hold that it was applicable under the facts and circumstances presented in the instant case."

4. In holding that Petitioners failed to satisfy their burden of proof of negligence, the Court of Appeals below has decided a question of both Federal and State law that is untenable and which departs from the usual and accepted course of judicial findings so as to call for an exercise of this Court's power of supervision. Petitioners (Plaintiffs below) were at a disadvantage in the trial of the case before the United States District Court because all matters concerning the accident were peculiarly within the knowledge of the Government as a result of its investigation.

The undisputed facts (R. 285-286) show that the pilot (a) ignored a signal to land and thereafter failed to land at the Naval Field, (b) ignored a signal to land and thereafter failed to land on the runway with which he was aligned (the runway in use) at the New Orleans Municipal Airport and (c) attempted to maneuver the malfunctioning airplane while over the New Orleans airport resulting in the subsequent spin and crash of the airplane.

Evidence of the above facts was in the nature of depositions, documentary evidence and certain parts of the accident report which were admitted in evidence. This Court is then in as good a position as was the District Court and Court of Appeals to determine the credibility of such evidence and thus to determine whether a finding of "no negligence" is clearly erroneous and unjustified. The force of such evidence adduced at the trial being undisputed is greatly increased by the failure of Respondent to rebut it, especially when Respondent had the means to do so. The rule in the Federal Courts, as adequately expressed by the Court of Appeals for the District of Columbia in the case of STONE v. STONE, 136 F. 2d 761, is that a Court will not disregard positive evidence uncontradicted and not inherently improbable; that uncontroverted evidence involving plain, simple facts capable of contradiction must ordinarily be accepted as true, when not incredible in itself, nor impeached nor discredited in any way. In this regard, it was stated in the STONE case as follows:

> "* * * to hold otherwise would vest triers of the facts in cases subject to review with authority to disregard the rules of evidence which safeguard the liberty and estate of the citizen."

This Court has found that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted. MAMMOTH OIL CO. v. UNITED STATES, 275 U.S. 13, 48 S. Ct. 1.

5. In holding that the alleged release instrument precluded recovery by Petitioners, the United States District Court decided an important question of Federal law under the Tort Claims Act which should be settled by this Court and

a question of local law in a way in conflict with all applicable local Texas decisions. Respondent relied upon a release instrument allegedly executed by the deceased, Walter Kyle Chapman, Jr., and his father, one of the Petitioners herein, under the terms of which the United States attempted to relieve itself of all liability for damages in the event of injury or death to young Chapman (R. 27-30).

The United States District Court admitted in evidence a copy of such release instrument with all signatures typed thereon and held the release as binding and enforceable so as to preclude recovery by Petitioners (R. 290-294). The Court of Appeals did not consider it necessary to rule on this issue in view of its affirmance of the District Court's finding regarding negligence (R. 309).

The alleged execution of the release was a separate transaction done sometime prior to the flight in question and before the tort occurred. The release was purportedly executed in the State of Texas and the flight was partially performed in said State, thus the laws of the State of Texas were considered applicable insofar as a construction of the release provisions were concerned.

Walter Kyle Chapman, Jr., was eighteen (18) years of age at the time he was killed (R. 283). The following principles of law are well settled in the State of Texas:

(a) A minor is not liable on his contract and his contract is voidable at his election. GARRARD, ET AL. v. HENDERSON, ET AL., 209 S.W. 2d 225 (Tex. Civ. App. 1948); SANDS v. CURFMAN, 177 S.W. 161 (Tex. Civ. App. 1915); WATSON, ET AL. v. GLENN, 82 S.W. 2d 704 (Tex. Civ. App. 1935).

(b) An act of disaffirmance by the minor must be done within a reasonable time after reaching majority, and the right to disaffirm has been extended to the minor's legal repre-

sentatives and heirs. SIMPKINS, ET AL. V. SEARCY, ET AL., 32 S.W. 849 (Tex. Civ. App. 1895).

(c) A release must be supported by some valid consideration to be binding. PETERS, ET AL. V. CLEMENTS, 52 Tex. 140 (S. Ct. 1879); TEXARKANA NATIONAL BANK V. HUBBARD, 114 S.W. 2d 389 (Tex. Civ. App., 1938); TEXAS & P. RY. CO. V. JONES, 133 S.W. 744 (Tex. Civ. App., 1911). This point of law is clearly demonstrated in GALVESTON H. & S. A. RY. CO. V. PIGOTT, 116 S.W. 831 (Tex. Civ. App., 1909), wherein it was held that a contract whereby parents consented to their son's employment and waived all claims they might have for damages for his death or injury in the line of his employment was without consideration. The Court made the following statement:

> "It would seem an enormity to sanction a contract which exempts one from liability for the death of a human being which he has brought about by his one negligence. * * *
>
> "Under the contract the consideration recited is no consideration at all. The parents waived everything * * * their right to recover their son's wages, as well as their right to recover damages, vouchsafed them by the law, in the event he was killed or injured while in the employment of the Company—and got nothing in the world except the piece of paper upon which the alleged contract was written."

Further, it has been established in Texas that a common carrier is liable for injuries sustained to one riding a free pass although containing a release of liability. M. K. T. RY. CO. V. FLOOD, 70 S.W. 331, 79 S.W. 1106; GALVESTON RY. CO. V. BEAN, 99 S.W. 721; GALVESTON RY. CO. V. MULLEN, 198 S.W. 409.

Contracts for exemption from liability for future negligence are not favored and are held void by many authorities,

particularly where a legal or public interest is involved and where there is personal injury or death. (17 C. J. S., Contracts, Sec. 262). In Texas, the law is clear that an agreement by a parent, as an inducement to the employment of a minor child, to hold the employer harmless for any injury to the child occasioned by the employer's negligence, is contrary *to public policy and void*. PACIFIC EX. CO., ET AL. v. WATSON, 124 S.W. 127 (Tex. Civ. App., 1909).

This Court has declared itself on the point in the case of BROOKLYN SAVINGS BANK v. O'NEIL, 65 S. Ct. 895, 324 U.S. 697, wherein this Court reviewed an action to recover unpaid overtime compensation, liquidated damages and attorney's fees under the Fair Labor Standards Act. The Petitioner tendered Respondent $500 for wages due and owing under the Act, and the latter accepted the money and signed a general release of all claims against the Petitioner. Thereafter, Respondent successfully sued for the statutory balance due him under the act. This Court made the following statement:

> "It has been held in this and other courts that a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy. Mid-State Horticultural Co. v. Pennsylvania Railroad Co., 320 U.S. 356, 361; 64 S. Ct. 128, 130, 88 L. Ed. 96; A. J. Phillips Co. v. Grand Trunk Western Ry., 236 U.S. 662, 667, 35 S. Ct. 444, 446, 59 L. Ed. 774, Cf. Young v. Higbee Company, 324 U.S. 204, 65 S. Ct. 594. Where a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate."

The legislative policy established by the Congress in passing the Tort Claims Act under which Petitioners herein brought their action had as its purpose the securing to certain individuals the *right* to sue the United States with the right of recovery against the United States in money damages for personal injury or death caused by the negligence or wrongful act or omission of any employee of the Government while acting within the scope of his office.

A provision is contained in the release instrument which specifically exempts a statutory right (third paragraph) which reads as follows (R. 291-292):

> "The execution hereof does not operate to waive any statutory right conferred by Act of Congress."

It is submitted that the foregoing paragraph specifically removes Petitioners from the effects, if any, of the release, since Petitioners' suit is based *solely* upon a statutory *right* conferred by Act of Congress, i.e., the Tort Claims Act. The Tort Claims Act creates both a right and a remedy. COMMISSIONERS OF THE STATE INS. FUND v. UNITED STATES, 72 F. Supp. 549 (D.C., New York, 1947); UARTE v. UNITED STATES, 7 F.R.D. 705; MAXWELL v. UNITED STATES, 141 F. 2d 139 (C.A. 7, 1944); MARICH v. UNITED STATES, 84 F. Supp. 829 (D.C. Cal., 1949).

The questions presented by this case are of great and recurring significance in the administration of the Tort Claims Act. The serious questions of *public policy* involved here and the effect of the decisions below, if unreversed, makes this case a peculiarly appropriate one for the exercise of this Court's discretionary jurisdiction.

Conclusion

For the foregoing reasons, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

W. K. CHAPMAN, ET UX.,
Petitioners

By
JACK K. AYER,
801 C and I Life Bldg.,
Houston, Texas,
Counsel for Petitioners

STONE WELLS,
Houston, Texas,
Of Counsel

APPENDIX

1. § 1732. Record made in regular course of business.

In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

The term "business," as used in this section, includes business, profession, occupation, and calling of every kind. June 25, 1948, c. 646, 62 STAT. 945."

2. AF REGULATION NO. 62-14
Washington, 20 October 1944

FLYING SAFETY

Investigation and Reporting of Aircraft Accidents
Emergency Procedures for Accidents and Overdue Aircraft (Clearance Nos. AAF-FS-T8 and AAF-FS-T9).
(This Regulation supersedes AAF Regulation 62-14, 26 May 1942, 62-14A, 28 January 1944, and 15-14, 7 September 1942).

* * * * *

Part Four
Investigation and Reporting

* * * * *

Section II—Appointment of Aircraft Accident Investigation Boards and Officers

40. *Appointment of Aircraft Accident Investigating Boards.* The Commanding officer of each AAF station will appoint one or more Aircraft Accident Investigating Boards to conduct investigations required of such boards by this Regulation.

a. Three (3) officers will be appointed to constitute each board.. Of the three (3) members, two, (2) will be pilot officers possessing outstanding experience or other qualifications warranting such appointment, and the other will be that available officer present possessing the widest engineering experience or training. The station commanding officer is authorized to appoint board members from the officer personnel of all organizations regularly based at or attached to his station as well as from officer personnel under his command.

b. Alternate members, similarly qualified, will be appointed for board members, and, in the absence of any board members, may be detailed by the senior member of the board present to perform the duties of the absent members.

c. All members of such boards, or alternates when serving, will personally engage in the required investigations and assist in the preparation of the required reports.

d. Ex-officio, non-voting members,

(1) (a) Representatives of Headquarters AAF, Office of Flying Safety are authorized and empowered to, and may, when so directed:

(1) Act as ex-officio and non-voting members of Aircraft Accident Investigating Boards and exercise technical supervision over and review the activities of the Board and the Station Accident Officer.

(2) Submit separate reports through channels or direct, concurring or dissenting from the reports of boards or accident officers.

(3) Conduct independent investigations of the aircraft accidents and "missing" aircraft with which this Regulation is concerned, including investigation of conditions at installations relating to or resulting in such accidents or "missing" aircraft.

(b) Commanding Officers will render full assistance as requested by such representatives of the Office of Flying Safety and will furnish to them such transportation, clerical help, military personnel, etc., as may be required.

(2) The intelligence officer of the station will serve as an ex-officio, non-voting member of the board but otherwise with full authority of a board member and with the particular responsibility to determine whether the available evidence has disproved the existence of sabotage. He will have full authority to make separate intelligence investigations and reports on any accident, and all such activity undertaken by the intelligence officer, or Counter Intelligence Corps personnel under his di-

rection, will be conducted in strict compliance with the provisions of TM 30-218 and such other policies and directives as may be issued by G-2, War Department General Staff, or AC/AS, Intelligence. When the intelligence officer of the station is unable to serve with the board, the commanding officer of the station will appoint the senior intelligence officer available to act as the intelligence, ex-officio, non-voting member of the board.

(3) The senior medical officer of the station will recommend a medical officer, preferably a Flight Surgeon or Aviation Medical Examiner, who will serve as an ex-officio, non-voting member of the board but otherwise with ful authority of a board member and with additional authority and responsibility to make separate reports for medical channels. The senior medical officer of the station will also recommend an alternate medical officer who will act in the absence of the medical officer member.

* * * * *

SECTION III—INVESTIGATIONS AND REPORTS

* * * * *

46. *Purpose of Investigation—Not Investigation Under the 70th Article of War.* Witnesses appearing before an Aircraft Accident Investigating Board or officer conducting an investigation required by this Regulation should be advised that such investigation is not one conducted under the 70th Article of War and that the purpose of such investigation is not to secure evidence for disciplinary action but to determine all factors in connection with accidents involving aircraft and to prevent recurrence of same in the interest of flying safety.

47. *Attachments:*

a. Personnel required herein to conduct investigations and submit reports are authorized to obtain from any AAF personnel, including surviving crew members, operations officers, engineering officers, weather personnel, tower operators, inspectors, post engineers, medical officers, civilian agencies contracting with, or civilians employed by the War Department, etc., information, data, and records, which may be of aid in completing such investigations and reports, and will attach same to AAF Forms 14 when applicable as provided in the Aircraft Accident Investigators' Handbook. Station Accident Officers are specifically authorized to obtain information, data, and opinions from the medical officer member of the local Aircraft Accident Investigating Board.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	7
Conclusion	11

CITATIONS

Cases:

Balchunas v. *Palmer*, 151 F. 2d 842	8
Comstock v. *Group of Investors*, 335 U.S. 211	7
General Pictures Co. v. *Electric Co.*, 304 U.S. 175	10
Jesionowski v. *Boston & Maine R. Co.*, 329 U.S. 452	9, 11
Johnson v. *Eastern Air Lines*, 177 F. 2d 713	11
Palmer v. *Hoffman*, 318 U.S. 109	8
Southern Power Co. v. *N.C. Public Service Co.*, 263 U.S. 508	10
Sweeney v. *Erving*, 228 U. S. 233	9
United States v. *Johnston*, 268 U.S. 220	10
United States v. *Kesinger*, 190 F. 2d 529	10

Statutes:

Act of July 1, 1946, 60 Stat. 346, 36 U.S.C. 201-208	3
Act of May 26, 1948, 62 Stat. 274, 5 U.S.C. (Supp. IV) 626l, 626m	3
Federal Business Record Act, 62 Stat. 945, 28 U.S.C. (Supp. IV) 1732	8
Federal Tort Claims Act, 62 Stat 869, 28 U.S.C. (Supp. IV) 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-2680	2

Miscellaneous:

6 A.L.R. (2) 528	11
Federal Rules of Civil Procedure:	
Rule 52	7
Rule 61	8
Prosser on *Torts* (1941), p. 296	11
Rhyne, *Aviation Accident Law* (1947), Ch. VIII and IX	11

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 105

W. K. CHAPMAN, ET UX., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the United States District Court for the Southern District of Texas (R. 283) is not reported. The opinion of the United States Court of Appeals for the Fifth Circuit (R. 300) is reported at 194 F. 2d 974.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 1952 (R. 309). The petition for a writ of certiorari was filed on June 4, 1952. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether both courts below erred in holding that petitioners, in a suit for damages under the Federal Tort Claims Act, had failed to establish negligence on the part of the United States.

STATEMENT

Petitioners brought suit under the Federal Tort Claims Act [1] to recover for the death of their son who, as a member of the Civil Air Patrol, was a passenger on a United States Air Force two-engine Beechcraft plane (T-7 type) which crashed near the Municipal Airport at New Orleans, Louisiana. The accident occurred on Sunday afternoon, September 12, 1948, as the plane, in a state of emergency with one engine dead and the other operating rough, came in for a landing. All on board, pilot, co-pilot and four passengers, died.

The action was begun in the United States District Court for the Southern District of Texas. The complaint alleged numerous specific acts of negligence in respondent's operation and maintenance of the plane (R. 10, 13-15) and in permitting flight under unfavorable weather conditions (R. 13-14). The complaint also pleaded *res ipsa loquitur* (R. 11, 12). The answer denied negligence (R. 23-24, 25), pleaded unavoidable accident (R.

[1] The Federal Tort Claims Act (60 Stat. 842, 28 U.S.C. (1946 ed.) 921 *et seq.*) was repealed and its provisions were revised and reenacted into law as 28 U.S.C. (Supp. IV) 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-2680 by the Act of June 25, 1948, effective September 1, 1948, 62 Stat. 869. Existing rights and liabilities were not affected by the repeal (62 Stat. 992).

42-44), and set out a release (R. 27-30) which had been executed by the decedent and his father (a petitioner herein), discharging the United States from any claim for death or injury which might occur by reason of the intended flight.

There is no dispute as to the underlying facts. Decedent Walter Kyle Chapman, Jr., was a cadet in the Civil Air Patrol, a civilian volunteer organization and auxiliary of the United States Air Force (R. 66).[2] Members of the CAP are permitted, upon their own request, to fly as passengers on local and cross-country Air Force flights (R. 66-67, 69, 72) for purposes of orientation and familiarization (R. 73-78). To participate in such flights the CAP cadet was required to furnish the release executed by himself and his parent (R. 77-78, 271-275, 292). Here, the necessary release was obtained (R. 32-4, 290-293) and authorization was issued for the decedent to proceed from Houston, Texas, to New Orleans, Louisiana, on the flight in suit (R. 67-68).

The plane took off about 12.30 P. M. from Ellington Field, an Air Force base near Houston, heading for the Municipal Airport at New Orleans (R. 99, 302n). A "25-hour preventative maintenance" inspection of the plane had been completed immediately prior to the flight (R. 151-155) and the radio equipment had been inspected and tested

---

[2] The Civil Air Patrol was created by Congress as a benevolent corporation, its purpose being to encourage civilian participation in aviation. Act of July 1, 1946, 60 Stat. 346, 36 U. S. C. 201-208. It was established as an auxiliary of the Air Force by the Act of May 26, 1948, 62 Stat. 274, 5 U. S. C. (Supp. IV) 626l, 626m.

some 48 hours earlier (R. 164-166). The maintenance men found both the plane and its equipment in "perfect" operating condition (R. 154, 166). The pilot was experienced and skillful (R. 96, 305n-306) and was qualified to fly this type of plane under both visual and instrument conditions (R. 96, 100). Before take-off, he had filed his flight plans, was briefed as to weather conditions over the entire route (R. 99-111, 302n-303, 304n-305), and was given a Visual Flight Rules clearance to New Orleans (R. 99, 302n-303).

When the plane was some 65 miles from the New Orleans Airport at 2:37 P. M., the pilot sent a radio message to the Traffic Control Center there reporting that he was 15 miles south of Baton Rouge flying at 2,000 feet and was meeting bad weather and overcast; he requested clearance to change from Visual Flight Rules to Instrument (R. 115-116, 303n). Five minutes later the New Orleans station gave this clearance and at the same time assigned a cruising altitude of 3,000 feet (R. 116-117, 303n). At 3:11 the pilot reported by radio that he was approximately 10 miles out of New Orleans flying at 3,000 feet but was unable to determine his position, and that his radio receiver was not operating (R. 117, 303n). The New Orleans station immediately instructed the pilot to advise the amount of fuel aboard and whether he desired that another suitable landing field be selected where better weather conditions prevailed (R. 118, 303n). This message was not acknowledged and apparently was not received (R. 118, 303n). At 3:13 the pilot re-

ported by radio that he would come down through a hole he had found in the overcast (R. 118-119, 303n). At 3:24 he radioed that he was at 750 feet, flying on only one engine, that he was in emergency and would land at the first field he came to (R. 119, 303n). The New Orleans station immediately alerted all fields and towers in the vicinity to clear their traffic and stand by for emergency (R. 119-120, 303n). At 3:32 the pilot radioed that he was coming down near the edge of a lake, that one engine was out and the remaining one functioning rough (R. 120, 303n). A notation on this message, apparently made by the radio operator who received it, stated that the first field would probably be the Navy Auxiliary Field (R. 120, 303n). That field had been alerted (R. 48-50). It is located near the edge of Lake Pontchartrain about two miles from the New Orleans Airport. It is surrounded by buildings and highways which make it difficult to locate, especially by one not familiar with it (R. 120-122).

About the time the last message was received, the plane was seen flying slowly one mile west of the Navy field at an altitude of approximately 200 feet (R. 50, 304n). A green light was flashed as a signal that the plane could land there (R. 51, 304n). The plane did not acknowledge the signal but flew on within a half mile of the field (R. 51-52, 304n). As it approached the New Orleans Airport it was lined up with one of its runways; a green light was flashing giving permission to land; without acknowledging this signal, the plane made a right

turn and then began a left turn to line up with another runway. It was now at an altitude of about 200 feet, three quarters of a mile away. A green light was directed to the aircraft signalling permission to land on the second runway. This signal the plane acknowledged by blinking its landing lights. As the plane continued to execute the left turn and began to lower its landing gear, it went into a spin, crashed and burned. (R. 250, 304n.)

At the trial, petitioners introduced no evidence on the negligence issue except in support of their contention that the pilot was not adequately briefed as to the weather (R. 179-225, 242-247, 304n-305). But they offered in evidence an accident investigative report relating to this accident prepared by a Board of Air Force Officers (R. 250-251). The contents of the report are described in the opinions of the courts below (R. 289, 306n-307). It includes the Board's opinion that among the causes of the accident was poor judgment of the pilot in not attempting to land at the Naval Air Station and in electing to fly a regular pattern at the New Orleans Airport instead of making a straight-in approach (R. 301 and see excluded exhibit, Report of Major Accident, Sec. M). The report was offered as a record made in the regular course of business and as an admission against interest (R. 250). At other points during the trial, when the Government introduced individual documents which happened also to have been included in the report, petitioners asked that the entire report be admitted in evidence (R. 97, 124, 171-173, 254).

The District Court sustained the Government's objection to the admissibility of the report (R. 290), found that the petitioners had failed to prove negligence (R. 290, 294) and in addition held that the release precluded any recovery (R. 294). The Court of Appeals for the Fifth Circuit reviewed the evidence as to negligence, found that petitioners failed to satisfy their burden of proof on that issue, held that the accident report was properly excluded, but if its exclusion was error, was harmless, declared that in view of its determination on the negligence question it was unnecessary to pass on the issue of release,[3] and affirmed the judgment for respondent (R. 300-309).

ARGUMENT

1. Essentially, the petition seeks nothing more than a review of the evidence underlying a factual issue, *i.e.*, the question of negligence, which was resolved against the petitioners by both courts below. Both courts found that petitioners had failed to show negligence. Indeed, as stated by the court below, a finding of negligence on the part of the pilot "would do great violence to the evidence" (R. 306). "A seasoned and wise rule of this Court makes concurrent findings of two courts below final here in the absence of very exceptional showing of error." *Comstock* v. *Group of Investors,* 335 U. S. 211, 214. See also Rule 52, Federal Rules of Civil Procedure. The careful consideration given to the evidence in the

[3] For the same reason we do not believe it necessary to discuss herein any question relating to the validity of the release.

opinions below patently demonstrates that no such error is present.

Nor does the result reached below turn on the refusal of the trial court to admit certain documentary evidence, specifically, an accident investigative report prepared by the Air Force. For, despite petitioners' emphasis on a claimed conflict of decisions under the Federal Business Record Act (62 Stat. 945, 28 U. S. C. (Supp. IV) 1732), and despite their attempt to avoid the rule of *Palmer* v. *Hoffman,* 318 U. S. 109, the plain fact is that both courts had the report before them, both read and examined it, and after weighing its contents, the Court of Appeals declared (R. 308):

> * * * we are of the clear opinion that nothing in the report, which the judge had before him and read, and which is before us in the record, requires or supports a different finding as to negligence from that made by him, and its exclusion, if error, was harmless.

To avoid the effect of the harmless error provisions of Rule 61, Federal Rules of Civil Procedure, petitioners must show that they have been denied substantial justice,—*viz.,* that the excluded evidence was "of real persuasive value." *Balchunas* v. *Palmer,* 151 F. 2d 842, 845 (C.A. 2). In that connection, it is significant that petitioners concede that the factual data included in the report is already in evidence (Pet. pp. 10-11). However, they stress the exclusion of the opinions and conclusions of the Air Force Board contained in the report as to the pilot's judgment, which the court below aptly

termed "the *post hoc* armchair speculations of the report" (R. 305). Petitioners' claim of prejudicial error—indeed, their principal ground for seeking review—consists of no more than an attack on the refusal of the courts below to admit and give determinative effect to mere opinions and speculative statements. Such refusal presents no important or novel question of evidence warranting review by this Court.

2. Petitioners' arguments relating to the doctrine of *res ipsa loquitur* and the rule relating to acts performed in sudden emergencies raises the same evidence question in a different manner. These contentions are but other methods of seeking review of evidentiary matters.

The effect of the *res ipsa loquitur* rule is simply that the facts of the accident themselves constitute a *prima facie* case which will permit an inference of negligence but which does not compel it. *Sweeney* v. *Erving,* 228 U.S. 233, 240; *Jesionowski* v. *Boston & Maine R. Co.,* 329 U. S. 452, 457. The burden of proof is not thereby shifted to the defendant and it remains for the trier of the facts to determine whether the preponderance of evidence is with the plaintiff. *Sweeney* v. *Erving, supra.* Here, respondent introduced substantially all the evidence in the record relating to the accident. That evidence—assuming, but not conceding, the *res ipsa loquitur* rule to be applicable—was sufficient to rebut the *prima facie* case. Both courts weighed all of the evidence and both courts declined to find negligence, holding that petitioners had failed to

sustain their burden of proof. Manifestly, whatever procedural benefits petitioners could obtain under the *res ipsa loquitur* doctrine were in fact obtained. The action was not dismissed for failure to make out a *prima facie* case but judgment was rendered for respondent because both courts below declined to draw the inference of negligence. This Court has repeatedly said that certiorari is not warranted merely to review the evidence or inferences drawn from it. *General Pictures Co.* v. *Electric Co.*, 304 U. S. 175, 178; *United States* v. *Johnston*, 268 U. S. 220, 227; *Southern Power Co.* v. *N. C. Public Service Co.*, 263 U. S. 508.[4]

No question peculiar to the Tort Claims Act is raised by the petition, nor would review here be dispositive of other airplane cases. For, in the last analysis, despite the suggestion implicit in petitioners' argument that the doctrine of *res ipsa loquitur* should be applied to and the rule relating to acts performed in sudden emergencies excluded from every aviation case, it is well established that the application of both doctrines depends ultimately upon the particular circum-

[4] There is no conflict with *United States* v. *Kesinger*, 190 F. 2d 529 (C.A. 10). There, a motion to dismiss was made at the close of plaintiffs' evidence, thus raising the question whether they had made out a *prima facie* case. The application of the doctrine of *res ipsa loquitur* compelled an affirmative answer. Thereafter, the court found negligence not by inference from the facts of the accident but from the direct evidence introduced by defendant, 190 F. 2d at 531, 533. No such motion was relied upon in the instant case and the court declined to draw the inference from either the facts of the accident or the other evidence introduced.

stances of the accident involved in each case.[5] Nothing in the Tort Claims Act even remotely suggests any different rule.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that further review is not called for and that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicior General.
HOLMES BALDRIDGE,
Assistant Attorney General.
SAMUEL D. SLADE,
LESTER S. JAYSON,
Attorneys.

JULY, 1952.

---

[5] *Res ipsa loquitur* is applicable only when the accident is one which ordinarily does not occur in the absence of negligence. *Jesionowski* v. *Boston & Maine R. Co., supra.* It is an accepted fact that the most carefully maintained and operated airplane may crash for any one of a variety of causes apart from negligence. See, *Johnson* v. *Eastern Air Lines,* 177 F. 2d 713, 715-716 (C.A. 2). That is one reason why most courts, especially where defendant is not a common carrier airline, hold the doctrine inapplicable in suits for damages resulting from airplane crashes. See, Prosser on *Torts* (1941), p. 296; Rhyne, *Aviation Accident Law* (1947), Ch. VIII and IX; 6 A.L.R. (2) 528.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1952 218904 89